

1 WO

2  
3  
4  
5  
6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA  
9

10  
11  
12 United States of America, )  
13 )  
14 Plaintiff, ) No. CR-95-320-PHX-RCB  
15 )  
16 vs. ) O R D E R  
17 )  
18 Castulo Soto-Valdez, )  
19 )  
20 Defendant. )  
21 \_\_\_\_\_ )

22 Defendant *pro se*, Castulo Soto-Valdez, is serving a 360 month  
23 sentence for a conviction, after a jury trial, for conspiring to  
24 distribute and possess with intent to distribute methamphetamine.  
25 Currently pending before the court is his "request to be provided  
26 . . . access" to the "entire preexisting case file, including all  
27 records and transcripts" in this case. Doc. (1310) at 1 and 2.  
28 Preliminarily, defendant stresses that he is "not seeking a free  
copy of the records and transcripts[.]" *Id.* at 1. Instead, he is  
"seeking to review" the "already existing records and transcripts"  
in this court's file. *Id.* Because he is incarcerated in Michigan,  
defendant requests that the Clerk of the Court "retrieve" the

1 court's "entire preexisting . . . file[,]" and send it via  
2 "Certified Mail" to the Warden there. Id. at 2. At odds with his  
3 earlier statement that he is not seeking a "free copy" of the  
4 existing court file, later in his request defendant states that he  
5 wants to be "allowed under supervision . . . to review, read and  
6 photocopy" parts of that file which he "deems necessary" to prepare  
7 a "motion for collateral relief." Id. at 3 (emphasis added).  
8 Finally, defendant requests that he be provided access to the  
9 court's file for "no less than . . . 45 days[,]" after which time  
10 the Warden "shall return the records" via "Certified Mail[.]" Id.

11 In his request, defendant is not seeking *in forma pauperis*  
12 status as 28 U.S.C. § 1915 allows. Defendant does claim to be  
13 indigent and unable to "obtain access" to the court's file due to  
14 his incarceration. Id. at 1, ¶ 3. Defendant further asserts that  
15 his "trial lawyer does not have a copy of the records and  
16 transcripts [in] this case." Id. at 1, ¶ 4. Similarly, defendant  
17 claims that his former lawyer did not provide him with a copy of  
18 those items. Id. at 1-2, ¶ 4.

### 19 Procedural Background

20 To place this request in context, a brief review of  
21 defendant's litigation history is necessary. Following his  
22 conviction and sentence, defendant appealed and the Ninth Circuit  
23 affirmed. United States v. Soto-Valdez, 191 F.3d 462 (9<sup>th</sup> Cir.  
24 1999). Just a few days prior to the issuance of that decision,  
25 defendant filed a separate action to vacate/set aside his sentence  
26 pursuant to 28 U.S.C. § 2255, Soto-Valdez v. Adams, 99-CV-01591  
27 (doc. 1145). After denying that section 2255 motion, this court  
28 entered judgment against defendant and dismissed the action (doc.

1 1211). Defendant promptly filed a notice of appeal with the Ninth  
2 Circuit (doc. 1212). Finding probable cause existed for  
3 defendant's appeal, this court allowed defendant to proceed *in*  
4 *forma pauperis* for appeal purposes only (doc. 1213). The court  
5 also issued a certificate of appealability solely as to the  
6 ineffective assistance of counsel claim, finding that defendant had  
7 made a substantial showing of the denial of a constitutional right  
8 in that regard. Id. Ultimately, the Ninth Circuit dismissed that  
9 appeal based on defendant's failure to file the opening brief.  
10 Doc. 1224.

11 Defendant acknowledges that the present request "is not a  
12 collateral attack upon [his] conviction or sentence." Id. at 1.  
13 Defendant asserts though that he needs access to the court's file  
14 to "perfect[] . . . a collateral attack raising an 'actual  
15 innocen[ce]' claim[,]" despite the fact that he has already filed a  
16 section 2255 motion which was unsuccessful.<sup>1</sup> Id. at 2, ¶ 5.

### 17 Discussion

18 Defendant Soto-Valdez does not indicate the statutory basis  
19 for his request to access the court's pre-existing file.  
20 Potentially, two statutes are applicable. The first is 28 U.S.C.  
21 § 753(f). Under that statute, a litigant who has been granted *in*  
22 *forma pauperis* ("IFP") status pursuant to section 1915 may file a  
23 motion to obtain a transcript at the government's expense upon a  
24 showing that his suit is "not frivolous and that the transcript is  
25

---

26 <sup>1</sup> The court observes, without deciding, that in light of the foregoing,  
27 it may be that any subsequent habeas corpus petition which defendant files may be  
28 deemed a "second or successive" petition which the Anti-Terrorism and Effective  
Death Penalty Act generally prohibits. See 28 U.S.C. § 2244(b)(1) (West 2006).

1 needed to decide the issue presented by the suit[.]" 28 U.S.C.  
2 § 753(f) (West 2006).

3 The second arguably applicable statute is 28 U.S.C. § 753(b).  
4 In relevant part that statute requires:

5 The original notes or other original records and  
6 the copy of the transcript in the office of the  
7 clerk shall be open during office hours to inspection  
by any person without charge.

8 28 U.S.C. § 753(b) (West 2006). Based upon this statute, the  
9 Seventh Circuit in Rush v. United States, 559 F.2d 455 (7<sup>th</sup> Cir.  
10 1977), held that incarcerated petitioners who had no counsel and  
11 who were "collaterally challenging [their] underlying criminal  
12 convictions" had "an *absolute personal right* to reasonable access  
13 to the pre-existing files and records of their underlying case."  
14 Rush, 559 F.2d at 458 (emphasis added).

15 "[U]nderscoring that the sought-after transcripts already  
16 exist[ed][,]" the Rush Court reasoned that "[d]enying access to  
17 court files to prisoners, given the statutory inspection rights  
18 granted by 28 U.S.C. § 753(b), works an invidious discrimination"  
19 in violation of the due process clause of the Fifth Amendment.  
20 Rush, 559 F.2d at 459 (citation omitted). Denying unrepresented  
21 prisoners access to court files is not "constitutionally harmless,"  
22 the Seventh Circuit further explained, "[b]ecause a privately  
23 retained counsel, under similar circumstances, when his client's  
24 resources are not unlimited, would (most assuredly study the  
25 record) for his client[.]" Id. (internal quotation marks and  
26 citation omitted). Thus, "relying in part upon its supervisory  
27 powers," the Rush Court "held that upon a proper application to  
28 inspect a preexisting court record, the district court should mail

1 the record to a prisoner 'providing appropriate safeguards to  
2 maintain the record's integrity[.]'" United States ex rel. Davidson  
3 v. Wilkinson, 618 F.2d 1215, 1217 (7<sup>th</sup> Cir. 1980) (quoting Rush,  
4 559 F.2d at 459 (footnote omitted). Indeed, the Rush Court  
5 sweepingly directed that "future requests for the pre-existing  
6 record in [an] underlying criminal proceeding should be *granted as*  
7 *of right by the district courts* to prisoners seeking to use the  
8 record to prepare a collateral attack on their conviction." Rush,  
9 559 F.2d at 459-460 (emphasis added).

10 In so holding, the Rush Court rejected the view that  
11 petitioners' *pro se* motion for verbatim transcripts at the  
12 government's expense was a section 753(f) request. According to  
13 the Seventh Circuit, petitioners' motion would not be construed as  
14 such because "no transcript fees would accrue because the 'records  
15 and files' sought [in] the underlying criminal case were already in  
16 existence." Rush, 559 F.2d at 458. The Seventh Circuit further  
17 reasoned that because "the district court could frank the record  
18 through the mails to one of the petitioners, no 'money appropriated  
19 for (the) purposes (of providing transcripts)' need be expended in  
20 providing the *original record* to [them][.]" Id. (emphasis added)  
21 (footnotes omitted). In light of the foregoing, the Rush Court  
22 vacated the district court's denial of petitioner's motion insofar  
23 as it was premised upon section 753(f).

24 Pointedly noting that "[n]o other circuits have adopted the  
25 Seventh Circuit position [in Rush][,]" the Eighth Circuit in United  
26 States v. Losing, 601 F.2d 351 (8<sup>th</sup> Cir. 1979), declined to follow  
27 Rush. Id. at 353 (citation omitted). Rather, after Losing, the  
28 rule in the Eighth Circuit is, much like a transcript request

1 pursuant to section 753(f), that "under section 753(b), access to  
2 materials such as a transcript is not constitutionally required  
3 until after judicial certification that access is required to  
4 decide issues presented in a pending, non-frivolous case." Chapman  
5 v. United States, 55 F.3d 390, 391 (8<sup>th</sup> Cir. 1995) (citing United  
6 States v. Losing, 601 F.2d 351, 353 (8<sup>th</sup> Cir. 1979)).

7 Likewise, in Sistrunk v. United States, 992 F.2d 258 (10<sup>th</sup>  
8 Cir. 1993), the Tenth Circuit also declined to follow Rush. The  
9 Sistrunk Court began its analysis with United States v. MacCollom,  
10 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976)). In MacCollom,  
11 the Supreme Court held that "an indigent defendant's right of equal  
12 access to procedures for review of his conviction was satisfied at  
13 the collateral relief stage by affording a defendant a free  
14 transcript upon a showing of a particularized need for the  
15 transcript as . . . § 753" requires. Id. at 259 (citations  
16 omitted). Recognizing that "some courts have held that the actual  
17 filing of a habeas petition is a necessary prerequisite[]" to  
18 complying with section 753(f), there was no need to resolve that  
19 issue in Sistrunk. Id. (citations omitted). Timing was not an  
20 issue there because the *pro se* prisoner did not satisfy section  
21 753(f)'s requirements in that he did not provide any factual  
22 allegations to support his ineffective assistance of counsel claim.  
23 Consequently, the Sistrunk Court held that the prisoner was not  
24 entitled to a free copy of his transcript under that statute. Id.

25 The fact that in Sistrunk the prisoner was requesting an  
26 existing transcript did not "compel[] a different conclusion." Id.  
27 "[D]isagree[ing]" with the Seventh Circuit that a "broad[] reading  
28 of § 753(b) was required to avoid constitutional problems," the

1 Sistrunk Court emphasized that in MacCollom the Supreme Court  
2 "explicitly stated that a defendant's constitutional right of equal  
3 access to the courts was satisfied by providing a defendant with a  
4 copy of his transcript on direct appeal and did not require an  
5 unconditional right to a transcript in collateral proceedings."  
6 Id. at 260 (citing MacCollom, 426 U.S. at 326, 96 S.Ct. at 2092).

7 Moreover, in Sistrunk the Tenth Circuit astutely commented,  
8 "even when furnishing pre-existing transcripts to prisoners[,] " the  
9 United States still incurs costs. Id. (citation and footnote  
10 omitted). Acknowledging that those "costs may be less than those  
11 required to be paid where a transcript has not yet been prepared,"  
12 the Tenth Circuit observed that "§ 753(f) specifies no minimum  
13 dollar amount as a prerequisite to its applicability." Id. The  
14 Court further noted "that the fees referred to in § 753(f) include  
15 copying and mailing costs." Id. at 260 n.5. It would be an  
16 "absurd result[,] " the Sistrunk Court found, if pursuant to that  
17 statute, "the United States could prepare transcripts for indigent  
18 defendants but could not subsequently copy or mail them to the  
19 defendant once they were prepared." Id. The Court posited that  
20 the "clerk's office could . . . eliminate copying costs by sending  
21 original transcripts to prisoners[,] " which is what the Seventh  
22 Circuit seems to require in Losing. See id. As the Sistrunk Court  
23 astutely observed, however, that would be problematic. Not only  
24 are there "concerns about preserving the transcripts," but the fact  
25 remains that § 753(b) requires that the clerk's records be  
26 available for public inspection." Id. The public's inspection  
27 rights could be greatly hampered if original court files were  
28 routinely sent to correctional facilities for prisoners' review. s

1 For all of these reasons, "[c]ontrary to the Seventh  
2 Circuit[]" in Rush, the Tenth Circuit in Sistrunk held "that  
3 § 753(f) is the *exclusive provision* governing requests by indigent  
4 prisoners for free transcripts, whether or not the transcripts  
5 already exist." Id. at 260 (emphasis added). Moreover, "before a  
6 defendant is entitled to a free transcript" pursuant to that  
7 statute, "he must make the particularized showing required"  
8 thereunder. Id.

9 Based upon Rush and its limited progeny within the Seventh  
10 Circuit, defendant Soto-Valdez contends that he is entitled to  
11 review the court's file in his criminal case and have photocopies  
12 of "relevant parts" provided free of charge to "prep[a]r[e] . . .  
13 his motion for collateral relief."<sup>2</sup> Mot. (doc. 1310) at 3. The  
14 court disagrees.

15 The Ninth Circuit has not yet had occasion to address the  
16 issue of whether § 753(b) or 753(f) governs a request such as  
17 defendant's. The Eighth Circuit in Losing, and the Tenth Circuit  
18 in Sistrunk have adopted what, in this court's view, is the sounder  
19 approach - from a legal as well as from a pragmatic standpoint. As  
20 discussed above, those courts found no constitutional harm in  
21 requiring a prisoner to comply with section 753(f) prior to being  
22 given access to even a pre-existing court file.

23 Broadly construing section 753(b)'s inspection rights, as the  
24 Seventh Circuit has, to require provision to prisoners of the  
25 "original record" would be unduly burdensome and costly. Provision  
26

---

27 <sup>2</sup> Evidently because the United States is not being asked to incur any  
28 expenses in connection with defendant's request, it did not file a response hereto.



1 of the "original record" could jeopardize the inspection rights of  
2 others under section 753(b), not to mention potentially  
3 compromising the integrity of the original court record. Granting  
4 prisoners access to the original record also would be complicated  
5 by multi-defendant cases where several prisoners are  
6 simultaneously, or nearly so, demanding access to the same original  
7 record.

8       Avoiding the difficulties inherent in providing such access to  
9 prisoners would, despite the Seventh Circuit's contrary assumption,  
10 result in additional cost to the United States. Mailing aside,  
11 copying costs would be incurred because it would be extremely  
12 difficult to maintain the integrity of the court's file if  
13 originals were routinely sent to correctional facilities. All of  
14 these reasons convince the court that an incarcerated individual,  
15 such as Mr. Soto-Valdez, must "make the particularized showing  
16 required by [28 U.S.C. § 753(f)]," before he will be entitled to  
17 obtain access to even a pre-existing court file. See Sistrunk, 992  
18 F.2d at 260. More specifically, such litigants must show that  
19 their suit is "not frivolous and that the transcript is needed to  
20 decide the issue presented by the suit[.]" 28 U.S.C. § 753(f).  
21 Section 753(b) does not provide such litigants with a separate,  
22 independent right of access to the court's original file.

23       Having found that section 753(f) rather than section 753(b)  
24 governs defendant's request herein, the court must next consider  
25 whether he has complied with the former statute. As a prerequisite  
26 to qualifying for a free transcript under that statute, a litigant  
27 must be certified to proceed IFP under section 1915(a). On this  
28 sparse record, defendant Soto-Valdez does not meet the economic

1 eligibility requirement of that statute. There is no "affidavit  
2 that includes a statement of all assets [he] possesses [showing]  
3 that the person is unable to pay such fees or give security  
4 therefor." 28 U.S.C. § 1915(a)(1) (West 2006). Nor has defendant  
5 Soto-Valdez provided a certified copy of his prisoner trust fund  
6 account for the preceding six months, as section 1915(a)(2)  
7 mandates.

8 In addition, there is no showing on this record that the  
9 actual innocence claim which defendant eventually wants to file is  
10 "not frivolous and that the transcript is needed to decide the  
11 issue[s] presented by" such a claim. See 28 U.S.C. § 753(f). The  
12 mere bald assertion of "actual innocence," with no supporting  
13 factual allegations does not satisfy section 753(f). See Sistrunk,  
14 992 F.2d at 259 (affirming denial of transcript request under  
15 § 753(f) where petitioner made only conclusory allegations that he  
16 was denied ineffective assistance of counsel); see also United  
17 States v. Falu-Mendoza, 2007 WL 2239403, at \*1 (S.D.Cal. Aug. 3,  
18 2007) (denying motion for sentencing hearing transcripts due to the  
19 "limited information provided in Defendant's motion[,] so that  
20 "Court [could] not determine whether his [§ 2255] petition w[ould]  
21 be frivolous or whether a transcript w[ould] be needed to decide  
22 the issues presented [there]in[.]""); and Morgan v. Doran, 2007 WL  
23 1080580, at \*2 (E.D.Cal. April 4, 2007) (denying request for  
24 preparation of transcripts at government's expense where motion  
25 "provide[d] insufficient information . . . to determine whether  
26 . . . case [wa]s one in which limited government resources should  
27 be spent on the preparation of transcripts[,] and where plaintiff  
28 "merely list[ed] all proceedings in . . . case" and did not

1 identify "specific issues he wishe[d] to appeal").

2 Finally, even if defendant Soto-Valdez had met section  
3 753(f)'s standards, still, he would not be entitled to access to  
4 the court's file under that section because his request is  
5 premature. "The vast majority of courts," have interpreted section  
6 753(f) "to mean that, until a prisoner actually brings a proceeding  
7 under section 2255, he is not entitled under § 753(f) to have costs  
8 for creating or copying such transcripts or other documents paid by  
9 the United States." United States v. Lucatero, 2007 WL 1747077, at  
10 \*1 (E.D.Cal. June 18, 2007) (citations omitted); accord United  
11 States v. Connors, 904 F.2d 535, 536 (9<sup>th</sup> Cir. 1990) (citation  
12 omitted) (indigent prisoner who had not filed a habeas petition,  
13 was not entitled to copies of his trial transcript at government  
14 expense under 28 U.S.C. 2250 until the filing of such a petition).

15 In the present case, defendant is apparently contemplating  
16 bringing a section 2255 motion in the future based upon an asserted  
17 claim of actual innocence. Under these circumstances, his  
18 constitutional right of access to the courts is not implicated.  
19 See Hansen v. United States, 956 F.2d 245, 248 (11<sup>th</sup> Cir. 1992)  
20 (prisoner's right of access to court files of underlying criminal  
21 proceedings does not "extend[] to access to the records for the  
22 purpose of *preparing* a collateral attack on a conviction[;] . . . a  
23 request by a prisoner for access to the court files of his  
24 underlying criminal conviction is premature prior to the filing of  
25 a collateral attack on that conviction[]"). The court is keenly  
26 aware that at least the Fourth Circuit has "ruled that under  
27 special circumstances it is permissible to consider a motion for  
28 free transcripts prior to the filing of a § 2255 petition, if

1 necessary for use therein." Lucatero, 2007 WL 174077, at \*2  
2 (citing United States v. Shoaf, 341 F.2d 832 (4<sup>th</sup> Cir. 1964)). As  
3 did the court in Lucatero, "this court is unwilling to circumvent  
4 the clear language of § 735(f) to promote a policy which would  
5 encourage fishing expeditions and other possible abuses." See id.  
6 This rationale is all the more compelling where, as here, defendant  
7 has already filed one section 2255 motion.

8 **Conclusion**

9 For the reasons set forth herein, IT IS ORDERED that defendant  
10 Castulo Soto-Valdez's "Request to be Provided with Access to  
11 Information Contained in the Preexisting Original Records Contained  
12 in the Files of the United States District Court" (doc. 1310) is  
13 DENIED.

14 DATED this 11th day of May, 2009.

15  
16  
17 

18 Robert C. Broomfield  
19 Senior United States District Judge  
20  
21  
22

23 Copies to counsel of record and defendant *pro se*  
24  
25  
26  
27  
28